

The Honorable Benjamin H. Settle

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA**

JOHN DOE #1, an individual, JOHN DOE
#2, an individual, and PROTECT
MARRIAGE WASHINGTON,

Plaintiffs,

v.

SAM REED, in his official capacity as
Secretary of State of Washington,
BRENDA GALARZA, in her official
capacity as Public Records Officer for the
Secretary of State of Washington,

Defendants.

NO. 09-cv-05456-BHS

DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT

**NOTED ON MOTION
CALENDAR:**

JULY 22, 2011

**ORAL ARGUMENT
REQUESTED**

I. MOTION

Defendants move for summary judgment pursuant to Fed. R. Civ. P. 56 and an Order of Dismissal with prejudice with respect to Count II, the remaining count of Plaintiffs' Complaint.

II. INTRODUCTION

Count II of Plaintiffs' Complaint alleges that, as applied to Referendum 71 (R-71), disclosure of signature petitions under Washington's Public Records Act (PRA) would

1 violate the First Amendment rights of persons who signed the petitions. Plaintiffs seek to
2 bring themselves within a line of cases that carve out a narrow exemption from public
3 disclosure requirements relating to campaign contributions, and other associational activities.
4 The exception protects the identity of members of disfavored minority organizations when
5 disclosure of their names would seriously undermine their First Amendment right to
6 associate for purposes of speech.
7

8 Summary judgment dismissing Count II is appropriate because this case does not
9 concern a disfavored minority group, and the Plaintiffs' evidence fails to demonstrate the
10 probability and seriousness of harm required to invoke the exception.
11

12 III. STATEMENT OF THE CASE

13 A. Referendum 71

14 In 2009, the Legislature enacted a bill expanding the rights and responsibilities of
15 same-sex and senior domestic partners. 2009 Wash. Sess. Laws page nos. 3065-3141 (E2SSB
16 5688). Under Washington law, within 90 days after a bill is passed by the legislature, the
17 people may file a petition, with a requisite number of signatures, calling for an election on
18 whether to accept or reject the bill. Wash. Rev. Code § 29A.72.030. The signed petitions are
19 filed with the Secretary of State, who must determine whether the petitions contain a sufficient
20 number of valid signatures from registered voters to satisfy the constitutional requirements for
21 placing the measure on the ballot. Anyone disagreeing with the Secretary's decision that a
22 referendum contains a sufficient number of valid voter signatures to qualify for the ballot may
23 challenge the decision in superior court. Wash. Rev. Code § 29A.72.240 (2009).
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1 In less than three months, Protect Marriage Washington (PMW), the sponsor of R-71,
2 gathered 137,000 petition signatures for a referendum election on E2SSB 5688. Signature
3 gathering occurred in busy public places, such as outside Wal-Mart and Target stores. Dkt.
4 #53 at 2; Dkt. #54 at 2. Each page allowed twenty signatures, with space for each person to print
5 his or her name and address. Wash. Rev. Code § 29A.72.130 (2009). Although it is not required
6 by state law, PMW also asked signers to disclose their email addresses.
7

8 In July 2009, PMW filed the R-71 petitions with the Secretary of State. After
9 canvassing the petitions, the Secretary concluded that the R-71 petition had enough valid
10 Washington voter signatures to qualify the measure for the ballot.
11

12 Washington Families Standing Together (WAFST) filed a request under Washington's
13 Public Records Act (PRA) to obtain the petitions so that it could review them to make certain
14 the Secretary correctly concluded that the petitions contained a sufficient number of valid voter
15 signatures to qualify for the ballot. Dkt. #45. The Secretary also received PRA requests from
16 others, including the Washington Coalition for Open Government (WCOG). Dkt. #36 at 2.
17

18 **B. Washington's Public Records Act**

19 Washington's Public Records Act (PRA) was enacted by the people using the initiative
20 process. Wash. Rev. Code § 42.56 (2009). The PRA requires disclosure of every record
21 containing information relating to performance of a government function, unless it is
22 specifically exempted from disclosure. Wash. Rev. Code §§ 42.56.030 (2009); 42.56.010(2)
23 (2009); 42.56.070(2) (2009). There is no exemption for signed petitions.
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1 **C. The R-71 Election**

2 On November 3, 2009, the election was held. Washington voters approved E2SSB
3 5688, expanding the rights of same sex and senior domestic partners. In the election, 951,822
4 voters (53.15%) voted to approve E2SSB 5688, while 838,842 (46.85%) voted to reject it.
5

6 **D. History of This Litigation**

7 On July 28, 2009, before the election, John Does Nos. 1 and 2 and PMW filed this
8 action alleging that the PRA violates the First Amendment rights of persons who sign
9 referendum petitions, and seeking to enjoin the release of such petitions. Plaintiffs advanced
10 two claims. First, in Count I, they asserted that releasing signed petitions for any referendum
11 would violate First Amendment rights. Complaint at 10. Second, in Count II, they asserted
12 that disclosing R-71 petitions would violate the petition signers' First Amendment right of
13 association by subjecting them to threats and harassment. *Id.* at 10-11.
14

15 This Court granted the Plaintiffs' motion for a preliminary injunction based on Count I
16 of the complaint. Dkt. #63. The Court did not rule on Count II, the claim that, as applied to
17 R-71, the PRA violates the First Amendment. *Id.* at 13.
18

19 This Court's preliminary injunction was reversed by the Ninth Circuit Court of
20 Appeals. *Doe v. Reed*, 586 F.3d 671 (2009). The United States Supreme Court affirmed the
21 Ninth Circuit. *Doe v. Reed*, 130 S. Ct. 2811 (2010). The Supreme Court did not consider
22 Count II because it had not been considered below. *Id.* at 2821.
23

24 **E. Plaintiffs' Evidence of Alleged Harassment**

25 The testimony and documents produced by Plaintiffs and their 19 disclosed witnesses
26 fall into four general categories: (1) verbal or written comments that did not cause witnesses to

1 feel threatened or call the police; (2) concerns resolved by the police or other authorities; and
2 (3) experiences witnesses admit arose outside the context of the R-71 campaign or may not be
3 related to R-71. Pursuant to the Joint Scheduling Order, only witnesses disclosed by August
4 23, 2010, may testify in person or by declaration in this case. Dkt. #128 at 1:19-26.
5

6 Plaintiffs' evidence of harassment is limited to persons who promoted R-71 by
7 broadcasting their names, faces, and opinions on television and radio, in newspapers, on
8 PMW's campaign webpage, and in statements of support in public documents. Dkt. #168, 170.
9 These persons spoke at public rallies, held R-71 signs at busy intersections, and posted R-71
10 signs at their homes. Dkt. #168 at 4-11. In other words, the evidence in this case concerns
11 persons who made themselves public spokespersons against E2SSB 5688. Their actions are
12 very different from simply signing an R-71 petition. Even as to PMW's witnesses, whose
13 actions go far beyond signing an R-71 petition, evidence of threats and harassment is
14 insufficient to meet the Plaintiffs' burden to show impact on First Amendment rights.
15

16 Plaintiffs offer nothing to suggest government involvement in, or support of, the
17 isolated instances of harassment to which Plaintiffs point. In those few instances where law
18 enforcement was contacted, its response was prompt and effective.
19

20 Nor have Plaintiffs offered evidence of R-71 related harassment which caused anyone
21 to decline to sign a petition or engage in speech related to R-71. Rather, the evidence shows
22 that Plaintiffs were able to gather more than 137,000 signature within a short period, and that
23 838,842 people, 46.85% of Washingtonians who voted in the R-71 election, supported
24 Plaintiffs in their opposition to E2SSB 5688.
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1 Finally, Plaintiffs have offered no evidence that persons providing financial support to
 2 PMW, whose names and addresses have been public for two years, have been subject to
 3 harassment or threats on that account. The names and addresses of PMW's campaign
 4 contributors have long been publically available on a State website. PMW registered with
 5 Washington's Public Disclosure Commission as a political committee and sought campaign
 6 donations. As required by Wash. Rev. Code § 42.17.370(10), PMW filed campaign finance
 7 disclosure reports with the Commission. Doug Ellis Decl. at 6. From May through November
 8 2009, PMW reported 857 contributions. Each contribution was posted on the Commission's
 9 website, including the contributor's name and address, the sum contributed, and the occupation
 10 and employer of contributors of more than \$100. *Id.* For over two years, the public has been able
 11 to view this information on the internet. *Id.*

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 14 In August 2009, PMW requested that the Public Disclosure Commission "seal" PMW
 15 donor information that had already been made available to the public. Ellis Decl. at 7:9-14.
 16 PMW supporters, including the REDACTED, testified before the Commission
 17 that they received uncivil, harassing, or threatening communications regarding R-71.
 18 Information regarding the REDACTED's involvement with the R-71 campaign was
 19 available from numerous public sources, including the media and PMW's campaign website.
 20 *Id.* at 7-8. Because PMW could not demonstrate any link between disclosure of names and
 21 addresses on the Commission's website, and the alleged harassment, the Commission denied
 22 PMW's request and continues to provide R-71 donor information to the public. *Id.*

23
 24 In sum, even as to those persons, whose actions are qualitatively and quantitatively
 25 different from signing an R-71 petition, evidence of threats and harassment is insubstantial. It
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1 falls far short of demonstrating the probability of serious harm undermining First Amendment
 2 rights of speech and association required to satisfy the narrow First Amendment exemption
 3 from public disclosure that the courts have recognized.
 4

5 **1. Verbal exchanges and gestures that were not perceived as a threat**

6 A number of witnesses testified that they observed individuals using rude language or
 7 gestures to express disagreement with the witness's political position. For example, REDACTED
 8 REDACTED stated that while collecting signatures, he had a verbal exchange with a woman and
 9 her boyfriend. Egeler Decl., Ex. 2 at 30:5 to 31:9. Mr. REDACTED stated that he did not
 10 understand what the boyfriend's angry statements meant, but no violence or physical contact
 11 occurred. *Id.* at 31:9-11. Mr. REDACTED explained that he did not call the police because he
 12 understands that people sometimes get mad about politics and have a right to express their
 13 own opinions. *Id.* at 32:11-20. Pastor REDACTED described similar verbal incidents
 14 which occurred during the collection of petition signatures. Egeler Decl., Ex. 3 at 28:18 to
 15 30:18. In a public park, a man shouted "a few sentences" which included profane language,
 16 then walked away. *Id.* at 30:3-4. Like Mr. REDACTED, Pastor REDACTED felt no need to call the
 17 police. *Id.* at 30:11-13. Pastor REDACTED related that "it wasn't a pleasant experience;
 18 however, I didn't feel being [sic] threatened by him." *Id.* at 30:11-18. He felt the same way
 19 regarding a verbal exchange while gathering signatures at a grocery store. A man shouted
 20 that Pastor REDACTED was taking his rights away, and used profanity. Pastor REDACTED did
 21 not call the police "because I didn't really feel being threatened by this man." *Id.* at 28:6-15.
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24 REDACTED also encountered verbal exchanges while gathering
 25 signatures at large businesses, such as Walmart. Egeler Decl., Ex. 4 at 17:19 to 23:13. On
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1 two occasions, when an unidentified person argued with the REDACTED or questioned what
 2 they were doing, a store manager intervened and the REDACTED continued their signature
 3 gathering. On another occasion, two women “glared” at REDACTED and stated “We have
 4 feelings, too.” *Id.* at 17:19 to 18:7. Although the REDACTED thought an older woman
 5 appeared shaken by the remark, she signed the petition. *Id.* at 18:8-21. The next incident
 6 involved a young woman who took a photo of the REDACTED and said she would post it on
 7 Facebook. *Id.* at 21:5 to 21:19. The REDACTED never looked into whether the photos were in
 8 fact posted. *Id.* at 21:23 to 22:7. The final incident occurred when a transgendered person
 9 approached them at Walmart, and said she would bring her homosexual friends to the
 10 REDACTED’s church. *Id.* at 18:22 to 20:5. REDACTED told her the church location and said
 11 all were welcome. *Id.* at 20:6-11. She never went to the church. *Id.* at 20:12 to 21:1.
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14 A number of Plaintiffs’ witnesses described written comments posted on the internet,
 15 regarding R-71. For example, REDACTED, President of the REDACTED ,
 16 testified regarding written remarks he saw posted on the web, expressing disagreement with
 17 the comments the REDACTED website posted generally condemning
 18 homosexuality and supporting the campaign to reject R-71. Egeler Decl., Ex. 8.
 19 Mr. REDACTED said he saw a website that mocked the REDACTED website. *Id.* at 51:4 to
 20 53:12. On another website, he saw a list of public figures, including REDACTED and
 21 Senator John McCain, listed as people whose very existence threatened gay people. *Id.* at 44
 22 to 51:2. Mr. REDACTED testified that there was no express threat in the message, but
 23 nonetheless he felt threatened by it. *Id.*
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1 **2. Witness concerns resolved by the police or other state authorities**

2 Only a few witnesses were sufficiently concerned to call the police. When the police
3 were contacted, they resolved the concern. For example, both Mr. REDACTED and the
4 REDACTED reported receiving phone calls they perceived to be hostile from a transgendered
5 individual named Krystal Mountaine. Egeler Decl., Ex. 4 at 46:24 to 55:4, Ex. 9 at 86:9 to
6 91:12. Although Mr. REDACTED did not recall feeling the need to contact the police, the
7 REDACTED reported the calls they received. According to REDACTED, the police
8 responded within the hour, and the calls stopped. Egeler Decl., Ex. 9 at 54:21-23 to 55:4.

10 Mr. REDACTED also recounted that a blogger in Bellingham posted comments on the
11 internet that Mr. REDACTED felt were threatening. Egeler Decl., Ex. 5 at 53:14-23.
12 Mr. REDACTED reported the blogger to the Snohomish County Sheriff who, in turn, reported the
13 matter to the Bellingham police for investigation. *Id.* at 56:25 to 57:19. Bellingham
14 Detective Allan Jensen investigated the complaint. Jensen Decl., Ex. A. The blogger,
15 John Bisceglia, explained to Officer Jensen that he viewed R-71 as a threat against his
16 family. *Id.* at 5. He stated “he was sorry that this had grown into a police complaint,”
17 assured Detective Jensen that “he would be careful on how he worded his blog posts,” and
18 “removed any post that might offend others.” *Id.* Detective Jensen concluded that the blog
19 did not merit criminal citation, but rather was “more the result of emotions” surrounding the
20 political issue. *Id.* Mr. REDACTED did not report anything involving the blog after the police
21 investigation.
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24 REDACTED was a 2009 candidate for the Legislature. The day after an REDACTED,
25 Washington, newspaper ran an article about Ms. REDACTED's campaign, entitled “REDACTED
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1 REDACTED ,” Ms. REDACTED received a threat from an anonymous
2 telephone caller. Egeler Decl., Ex. 7 at 17:19 to 18:18. The lengthy article regarding her Tea
3 Party views contained a brief mention, near the end of the article, that REDACTED supported the
4 National Rifle Association and R-71.¹ An unidentified caller told her 13-year-old son “I will
5 kill you and your family” and then hung up. *Id.* at 18:9-10. Ms. REDACTED called the police, who
6 responded within five minutes. *Id.* at 19:13-20. Responding police officer Andrew Mehl
7 informed Ms. REDACTED that death threats are fairly common, explained how to trace any further
8 calls, suggested that she get caller I.D., and encouraged her to call the police if anyone
9 appeared to be watching or following her. *Id.* at 20:2-25; Mehl Decl., Ex. A at 1. He assured
10 her that he would do extra patrols of the house and advise the other patrol squads. *Id.* at
11 30:10-19. Statements written and signed by Ms. REDACTED and her son the night of the incident
12 are included in the police report. Mehl Decl., Ex. A at 4-5. The statements reflect that the
13 caller did not state why he was making the threat, and never mentioned R-71 or any other
14 political issue. *Id.* The next day, the police made a follow-up call to check in on Ms. REDACTED.
15 Mehl Decl., Ex. A at 2. No action on the threat ever materialized.

18 REDACTED testified that while he was distributing R-71 brochures on a
19 Washington State ferry boat, a man tossed the brochure back at him and said “this is a bunch
20 of shit” and that “he and his boyfriend had just as much right to get married as I did.” Egeler
21 Decl., Ex. 10 at 25:19 to 26:12. Mr. REDACTED says he responded to the man by “taunting him a
22 little bit.” *Id.* at 26:1-4. Although the individual did not threaten violence, when he began
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26 ¹The article is available at <http://www>

1 following Mr. REDACTED on the boat, the ferry workers assisted Mr. REDACTED in walking away
 2 from the individual. *Id.* at 27:13-15; 28: 3-13.

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 4 **3. Experiences witnesses admit arose outside the context of the R-71
 campaign, or concede may not be related to R-71**

5 A few of the witnesses shared stories that had no relationship to R-71, or which the
 6 witness admitted may not have been related to R-71. For example, Pastor REDACTED
 7 provided deposition testimony regarding a number of large events he has participated in, over a
 8 period of many years, relating to his staunch opposition to homosexuality. Egeler Decl., Ex. 6.
 9 Before R-71 existed, he conducted public protests at high schools in North Bend and Issaquah
 10 to object to “Days of Silence” the students held in support of gay and lesbian classmates. *Id.* at
 11 24:14 to 26:21; Egeler Decl. Ex. 1 at 20:1 to 21:1. During one such event, a man was
 12 photographed holding a sign by Pastor REDACTED that said “Throw Rocks Here.” Egeler
 13 Decl. Ex. 6 at 27:7-8. When asked whether anything actually was thrown, Pastor REDACTED
 14 responded, “Oh, no. I mean, that wouldn’t have happened.” *Id.* at 28:17-18. He was
 15 convinced that the presence of the police at the rally helped to prevent any violence. *Id.* at
 16 35:11-19. On another occasion, Pastor REDACTED encountered protests against his public
 17 criticism of Microsoft for its policies of tolerance for homosexuals. *Id.* at 8:10 to 9:7. He
 18 invited the protesters to attend his church and they came and were well-behaved. *Id.* at 52:21
 19 to 54:16. Finally, in the years prior to R-71 becoming an issue, Pastor REDACTED said he
 20 received “900 calls” threatening to “take him out.” *Id.* at 66:3-19. He could not connect any
 21 of these calls to his stance on R-71, as opposed to his other public rallies and activities
 22 condemning homosexuality. *Id.* Despite the years of verbal threats, he has remained a vocal
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1 opponent of gay rights, and has never been physically attacked. He credits this in part to the
2 willingness of city, county, and state police to protect him. *Id.* at 68:6 to 69:4.

3 REDACTED testified that his eight-year-old daughter told him that a man took a
4 picture of his house. Egeler Decl., Ex. 5 at 59:9-23. Mr. REDACTED testified that he ran outside
5 and saw a car being driven away that he could not identify. *Id.* He was not certain the incident
6 had anything to do with R-71. *Id.* at 61:18-21. Although Mr. REDACTED claims he was fearful
7 enough to have his sons load their guns, and require his daughters to sleep in the living room,
8 he does not recall whether he called the police. *Id.* at 61:13-16; 64:3-14. There were no other
9 incidents involving his home or family.
10

11 IV. ARGUMENT

12 A. Summary Judgment Standards

13 Summary judgment is appropriate when there is “no genuine issue as to any material
14 fact” and the petitioners are “entitled to judgment as a matter of law.” Fed. Rule Civ. Proc.
15 56(c). To survive the motion for summary judgment, Plaintiffs must establish that there is a
16 genuine issue of material fact. *Matsushita v. Zenith Ratio Corp.*, 475 U.S. 574, 585-586
17 (1986). In this case, there are no material facts in dispute. The defendant’s motion is
18 supported by the deposition testimony of the Plaintiffs and their witnesses. In addition, the
19 motion is supported by the official police reports from two of the officers who responded to the
20 few incident reports made by the Plaintiffs and their witnesses.
21

22 Facts are viewed in the light most favorable to the nonmoving party “‘only if there is a
23 ‘genuine’ dispute as to those facts.’” *Ricci v. DeStefano*, 129 S. Ct. 2658, 2677 (2009),
24 quoting *Scott v. Harris*, 550 U.S. 372, 380 (2007). Once the petitioners have met their burden
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1 under Rule 56(c), the Plaintiffs must do more than show a “metaphysical doubt.” *Scott*, 550
 2 U.S. at 380. “When opposing parties tell two different stories, one of which is blatantly
 3 contradicted by the record, so that no reasonable jury could believe it, a court should not adopt
 4 that version of the facts for purposes of ruling on a motion for summary judgment.” *Id.*

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 6 **B. The State Has An Important Interest In Preserving The Integrity Of The Electoral**
 7 **Process.**

8 The Supreme Court held that the PRA is directly related to the State’s important
 9 interest in preserving the integrity of the electoral process by detecting fraud. *Doe*, 130 S. Ct.
 10 at 2819. As the Supreme Court held, “[t]he State’s interest in preserving the integrity of the
 11 electoral process is undoubtedly important.” *Id.* The Court recognized that the disclosure
 12 required by the PRA “helps prevent certain types of petition fraud otherwise difficult to detect”
 13 and “can help cure the inadequacies of the verification and canvassing process.” *Id.* at 2820.

14 As the Supreme Court recognized, absent access to the petitions, the public cannot verify
 15 whether the State properly determined that a referendum qualified for the ballot. Without access
 16 to the names of signers, the public cannot confirm whether PMW gathered signatures in a
 17 fraudulent manner or from persons disqualified from voting, or confirm whether the Secretary of
 18 State properly verified and counted the signatures. Public access to signature petitions thus
 19 provides an important check on the integrity of the referendum election process.

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 21 Washington’s concern with the integrity of the electoral process, including ferreting out
 22 circumstances of illegal voting, does not end with this particular election. Ensuring the
 23 integrity of the state’s election systems is a matter of continuous concern. *E.g., Porter v.*
 24 *Bowen*, 496 F.3d 1009, 1013 (9th Cir. 2007) (review of legality of Secretary of State’s actions
 25 after election concluded not moot, because State could act similarly in future elections). As the
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1 Supreme Court recognized, the State has a “particularly strong” interest in eliminating fraud.
2 *Doe*, 130 S. Ct. at 2819. Fraud “drives honest citizens out of the democratic process and
3 breeds distrust of our government.” *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). There are
4 numerous cases in which the courts across the country have found fraud or corruption in the
5 initiative petition process. *See, e.g., Roberts v. Priest*, 975 S.W.2d 850 (Ark. 1998) (finding, in
6 part, that initiative petition had false and forged signatures).

7
8 PMW continues to be a PAC registered in the state of Washington. Therefore,
9 evidence of forgery or fraudulent behavior by PMW, and the State’s response to such behavior,
10 continues to be a matter of public interest. Public disclosure may be the only means of
11 determining whether PMW engaged in “bait and switch” fraud, by misrepresenting the issue in
12 order to persuade individuals to sign the petitions. *Doe*, 130 S. Ct. at 2820; *Montanans for*
13 *Justice v. State ex rel. McGrath*, 146 P.3d 759 (2006) (upholding finding that signature
14 gatherers used bait and switch tactics to deceptively obtain signatures). “The signer is in the
15 best position to detect these types of fraud, and public disclosure can bring the issue to the
16 signer’s attention.” *Doe*, 130 S. Ct. at 2820.

17
18 Finally, Plaintiffs’ own testimony expresses concern about the Secretary of State’s
19 proper verification of signatures on future petitions. *E.g., Egeler Decl.*, Ex. 9 at 40:11 to 42:20
20 (explaining concern about Secretary of State’s ability to check signatures accurately and
21 without bias in the future); *Egeler Decl.*, Ex. 4 at 34:20 to 35:18 (explaining desire to change
22 the signature verification process). As the Supreme Court noted, the job of checking signatures
23 “is large and difficult”. *Doe*, 130 S. Ct. at 2820. The Secretary of State typically checks
24 signatures using sampling techniques that examine just 3 to 5% of the signatures, and mistakes
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1 can occur. *Id.* Given the difficulty of the task, transparency and government accountability are
 2 particularly important. Public oversight helps the State identify and “cure the inadequacies of
 3 the verification and canvassing process” and can provide the public confidence about the
 4 quality of the State’s performance in upcoming elections. *Id.*

6 **C. PMW Cannot Establish A Reasonable Probability That Disclosure Will Result In**
 7 **Serious Threats, Harassment or Reprisals**

8 The Supreme Court has ruled that the State’s important interest in disclosure can be
 9 overcome only “where the threat to the exercise of First Amendment rights is so serious and
 10 the state interest furthered by disclosure so insubstantial that the Act’s requirements cannot be
 11 constitutionally applied.” *Buckley v. Valeo*, 424 U.S. 1, 71 (1976). PMW cannot meet its
 12 burden of establishing “a ‘reasonable probability’ that the compelled disclosures will subject
 13 those identified to ‘threats, harassment, or reprisals’” of this nature. *Brown v. Socialist*
 14 *Workers Party*, 459 U.S. 87, 88 (1982) (quoting *Buckley v. Valeo*, 424 U.S. at 74 (1976)). The
 15 testimony of Plaintiffs’ witnesses falls far short of meeting Plaintiffs’ burden to establish
 16 “reasonable probability of serious and widespread harassment that the State is unwilling or
 17 unable to control.” *Doe*, 130 S. Ct. at 2829 (Sotomayor, J., concurring).

19 The Supreme Court has extended an exception to public disclosure only to established
 20 groups that demonstrated they were unpopular and would be significantly disadvantaged in
 21 exercising their First Amendment interests if disclosure were required. These groups could
 22 demonstrate a reasonable probability that disclosure of the names of their members would result
 23 in threats, harassment, and reprisals that would seriously undermine their ability to associate
 24 for First Amendment purposes. In each case, disclosure presented not only a direct threat of
 25 serious harm, but also a likelihood that law enforcement would be unwilling or unable to
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1 address the harm. The seminal case is *NAACP v. Alabama*, 357 U.S. 449, 462-63 (1958), in
 2 which the state of Alabama required the NAACP to disclose its membership information. The
 3 NAACP was challenging Alabama's official state policy of segregation, in the 1950's. The
 4 state alleged that disclosure of members' names would assist the state in determining whether
 5 the NAACP was conducting business in Alabama. The Court was "unable to perceive" how
 6 disclosure of the rank and file members of the NAACP would further the state's interest in
 7 knowing whether the NAACP was doing business in the state. *Id.* at 464-66. In this respect,
 8 *NAACP v. Alabama* is readily distinguishable. The Court also found that the NAACP "made an
 9 uncontroverted showing that on past occasions revelation of the identity of its rank-and-file
 10 members has exposed these members to economic reprisal, loss of employment, threat of
 11 physical coercion, and other manifestations of public hostility." *Id.* at 462. Given both the
 12 lack of state justification for disclosure, and the overwhelming evidence of private and state
 13 harassment, the Court held that compelled disclosure would violate the First Amendment.
 14 Plaintiffs' circumstances are a far cry from those in *NAACP v. Alabama* in this respect as well.

17 In *Brown v. Socialist Workers*, the Supreme Court addressed a state requirement that the
 18 Ohio Socialist Workers Party (SWP) disclose the names of its contributors and recipients of
 19 campaign expenditures. The SWP was "a small political party with approximately sixty
 20 members" whose goal was "the abolition of capitalism and the establishment of a workers'
 21 government to achieve socialism." *Brown*, 459 U.S. at 88. The Court illustrated the SWP's
 22 dramatic separation from the mainstream by noting that in 1980, the Party's U.S. senatorial
 23 candidate received just 1.9 % of the total vote. *Id.* at 89. Here, Plaintiffs easily secured the
 24 signatures necessary to put the measure on the ballot, and ultimately their position was
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1 supported by 46.85% of the voters who participated in the R-71 election. The Party proved
2 “specific incidents of private and government hostility” including “the burning of SWP
3 literature, the destruction of SWP members’ property, police harassment of a party candidate,
4 and the firing of shots at an SWP office.” *Id.* at 99. In addition, “in the 12-month period before
5 trial 22 SWP members, including four in Ohio, were fired because of their party membership.”
6 *Id.* The evidence also established that the FBI “conducted surveillance of the Ohio SWP,”
7 interfered with its activities, and planted FBI informants in the SWP. *Id.* at 100 and n.18.
8 The Court noted that the evidence included “numerous instances of recent harassment” in
9 addition to the extensive past government harassment. *Id.* at 100-101. In this case,
10 Plaintiffs’ evidence demonstrates none of this.
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12 Similarly, the Second Circuit held that the Communist Party was exempt from
13 disclosure under the Federal Election Campaign Act. *Fed. Elec. Comm’n v. Hall-Tyner*
14 *Elect. Campaign Comm.*, 678 F.2d 416 (2nd Cir. 1982). The Court found that disclosure
15 created a serious risk of harm, including government prosecution. The Court noted that
16 “[n]umerous statutes purport to subject members of the Communist Party to both civil
17 disabilities and criminal liability.” *Id.* at 422. The Court expressed concern with state “laws
18 which place supporters of the Committee in danger of legal sanctions or harassment if their
19 ties with the Communist Party should be made public. It is still illegal in many states simply
20 to be a member of the Communist Party.” *Id.* Finally, the Court pointed to a senate report
21 detailing “extensive governmental surveillance and harassment long directed at the
22 Communist Party and its members.” *Id.* at 423.
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1 The evidence of harassment and alleged threat to First Amendment rights in the
 2 instant case pales in comparison to the circumstances the Supreme Court has determined
 3 warrant an exemption from public disclosure. In cases on par with the instant case, the
 4 Supreme Court has ruled in favor of disclosure. In *Buckley*, the Court upheld a challenge to
 5 federal requirements that political committees and candidates disclose the name and address
 6 of contributors of \$10 or more, and the occupation and place of business of persons
 7 contributing \$100 or more. *Buckley*, 424 U.S. at 63. The Plaintiffs established that fear of
 8 disclosure caused a few people not to contribute. *Id.* at 72. The Court explained that a case
 9 similar to *NAACP v. Alabama* could be brought only “where the threat to the exercise of First
 10 Amendment rights is so serious and the state interest furthered by disclosure so insubstantial”
 11 that the federal disclosure requirements “cannot be constitutionally applied.” *Id.* at 71. “But
 12 no appellant in this case has tendered record evidence of the sort proffered in *NAACP v.*
 13 *Alabama.*” *Id.* Recognizing the important interests of the state and the electorate in
 14 disclosure, the Court stated that if injury actually exists, “the type of chill and harassment
 15 identified in *NAACP v. Alabama* can be shown.” *Id.* at 74. Given the lack of significant
 16 harm, the Court found that “the substantial public interest in disclosure . . . outweighs the
 17 harm generally alleged.” *Id.* at 72. That is the case here.

21 **1. Plaintiffs have failed to offer evidence showing a reasonable probability**
 22 **that disclosure will result in threats or harassment leading to substantial**
 23 **First Amendment harm**

24 To succeed on the merits, PMW must offer proof that disclosure of the R-71 petition
 25 signatures presents a risk of harassment and threats comparable to the *NAACP* and *Socialist*
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1 *Workers Party* cases. As the Supreme Court stated, “what little plaintiffs do offer” hurts
2 rather than helps their cause. *Doe*, 130 S. Ct. at 2821.

3 The only evidence offered concerns persons who were spokespersons or otherwise
4 took extraordinarily public efforts to air their political views opposing E2SSB 5688. These
5 individuals are not similarly situated with persons who only signed the petition, and,
6 accordingly, there is no reason to believe that their experience forecasts the experiences of
7 petition signers. The witnesses offered by PMW are sponsors and endorsers of R-71, who
8 made every effort to expose the public to their political opinions. Their experiences do not
9 demonstrate a probability that “rank and file” signers of the petition would be subject to
10 harassment. Even if their experiences were probative, the proposed witnesses’ alleged
11 experiences fall far short of establishing the type of harassment and harm to First
12 Amendment interests identified in the *NAACP* and *Socialist Workers Party* cases. The
13 testimony does not establish the level of harassment necessary to overcome the State’s
14 important interest in preserving the integrity of the electoral process.

17 PMW has repeatedly alleged instances of severe harassment, including death threats
18 and destruction of property. In addition to being allegation highly exaggerated, the
19 deposition testimony of PMW’s witnesses shows that there is no basis for connecting these
20 incidents to the witnesses’ signature on the R-71 petition. As previously noted, for example,
21 PMW contends that an individual threatened REDACTED in his home, and that as a result,
22 Mr. REDACTED feared for the safety of his family. Dkt. #3 at 5. Mr. REDACTED’s deposition
23 testimony tells a different story. His eight-year-old daughter saw a man take a picture of the
24 REDACTED home. Egeler Decl., Ex. 5 at 59:15 to 60:15. The man did not say anything to the
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1 child about why he was taking the picture. *Id.* at 61:1-2. Mr. REDACTED does not know
 2 whether this incident was related to R-71. *Id.* at 61:18 to 62:5. Mr. REDACTED claims he was
 3 fearful, yet he does not recall whether he even bothered to call the police. *Id.* at 61:13-17.

4 The testimony of REDACTED regarding a death threat made by a telephone caller
 5 similarly fails to establish a risk of harm related to R-71. Ms. REDACTED admitted to the police
 6 that the caller never mentioned R-71 or any other issue, so she cannot know what motivated
 7 the caller, or whether the call was an inappropriate prank. Egeler Decl., Ex. 7 at 21:18-25.
 8 And, in stark contrast to the situation faced by NAACP members in Alabama in the 1950's,
 9 or members of the Socialist Workers or Community Parties, Ms. REDACTED had no reason to doubt
 10 the willingness of the police to come to her assistance. The police responded within five
 11 minutes of Ms. REDACTED's call, and followed up with her the next day. *Id.* at 19:13-20, 20:2-25;
 12 Officer Mehl Decl., Ex. A. Ms. REDACTED never experienced any actual harm.

13 The majority of PMW's allegations involve rude gestures or language observed while
 14 campaigning in public locations. Profane language, and even "mooning" of those holding
 15 signs on busy intersections is not unique to the R-71 campaign. James Keough Decl. It is
 16 commonly experienced by those advocating both conservative and liberal positions in an
 17 election. *Id.* This political discourse is not a "threat to the exercise of First Amendment rights
 18 so serious and the state interest furthered by disclosure so insubstantial that the Act's
 19 requirements cannot be constitutionally applied." *Buckley*, 424 U.S. at 71.

20 Similarly, rude or profane comments made in email messages, on the internet as
 21 comments to newspaper articles, or on blogs have become an ordinary part of the public
 22 discourse on political issues. This is experienced daily in the ordinary course of candidate
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1 and ballot measure campaigns. See Keough Decl. As PMW's intended witness REDACTED
 2 REDACTED acknowledged, it is common to see ugly comments posted in response to internet
 3 articles regarding political issues. Egeler Decl., Ex. 10 at 29:7 to 30:25. The weight to be
 4 given caustic internet comments and blogs was recently addressed by the Ninth Circuit in
 5 *Doe v. Kamehameha School*, 596 F.3d 1036 (9th Cir. 2010), *reh'g denied*, No. 09-15448,
 6 2010 WL 4400428 (9th Cir. Nov. 8, 2010). There, the Ninth Circuit recognized that "many
 7 times people say things anonymously on the internet that they would never say in another
 8 context and have no intention of carrying out." *Id.* at 1045. Emotional or profane comments
 9 are unfortunate, but they fall short of demonstrating a reasonable probability of serious harm
 10 that would substantially undermine First Amendment rights. The circumstances surrounding
 11 R-71 demonstrate the Ninth Circuit's point. Rude language vented frustration with the R-71
 12 campaign, but *never* escalated into physical action.
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15 The PMW also contends that yard signs and bumper stickers were damaged during the
 16 campaign. Yet PMW's intended witnesses had no indication that any of this was a reaction to
 17 R-71, as opposed to irritation with campaign signs or general vandalism. As PMW's intended
 18 witness State Senator REDACTED testified, campaign signs are often stolen or demolished.
 19 Egeler Decl., Ex. 11 at 83:15 to 84:4. This happens without regard to the subject of the yard
 20 signs. See James Keough Decl. at 3:12-21.
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22 **2. Allegations regarding California's Proposition 8 are irrelevant**

23 Under the Joint Scheduling Order entered in this case, witnesses not disclosed by
 24 August 23, 2010, "will not be permitted to testify in person, by declaration or affidavit, or
 25 otherwise." Dkt. 128 at 1. No California witnesses were identified, and, therefore, such
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1 testimony cannot be admitted in this case. However, even if such testimony could be used,
 2 PMW's case is not aided by referring to California's Proposition 8, which amended
 3 California's constitution to prohibit same-sex marriage. Amici employed the same
 4 arguments asserted by PMW, and sought to show a risk of harassment by relying on the
 5 experience of California's Proposition 8 supporters, in *Citizens United v. Fed. Elec. Comm'n*,
 6 130 S. Ct. 876 (2010).² The Court refused to find harassment based on injuries allegedly
 7 suffered in campaigns not at issue in *Citizens United*. The Court stated that Citizens United
 8 "offered no evidence that its members may face similar threats or reprisals. To the contrary,
 9 Citizens United has been disclosing its donors for years and has identified no instance of
 10 harassment or retaliation." *Citizens United*, 130 S. Ct. at 916. The same is true here.
 11 *Citizens United* reflects the Court's consistent rejection of similarly slim and speculative
 12 evidence regarding harm from disclosure of campaign contributions and contracts for
 13 electioneering communications. In *McConnell v. Federal Election Commission*, 540 U.S. 93
 14 (2003), the Court concluded that such speculation "cannot outweigh the public interest in
 15 ensuring full disclosure before an election actually takes place." *Id.* at 201. As the Court
 16 recognized in response to similar arguments in *Citizens United*, evidence relating to a
 17 California election is not relevant to a challenge to disclosure of donors in a different
 18 election. *Citizens United*, 130 S. Ct. at 916. This is particularly the case as Washington's
 19 actual experience with respect to the R-71 election now is known.

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 23 Even if evidence regarding California's Proposition 8 election were relevant, it would
 24 be unpersuasive with respect to the Plaintiffs' burden in this case. In a challenge brought to

25 ² Briefs of Amicus Curiae in *Citizens United*, Inst. for Justice at 13 and Alliance Def. Fund at 17.
 26 http://www.scotuswiki.com/index.php?title=Citizens_United_v._Federal_Election_Commission#Amicus_Briefs
 (last visited on June 27, 2011).

1 California's statutory requirement that Proposition 8 campaign donors be disclosed, the
 2 federal district court rejected the same evidence, concluding that in "light of clearly
 3 established precedent, this Court is unable to say that the State's interest here is similarly
 4 diminished or that the Plaintiffs' potential burden is even remotely comparable [to that in
 5 *Brown v. Socialist Workers Party*]." *ProtectMarriage.com v. Bowen*, 599 F. Supp. 2d 1197,
 6 1214 (2009). According to the court, there "is surely no evidence that the seven million
 7 individuals who voted in favor of Proposition 8 can be considered a 'fringe organization' or
 8 that their beliefs would be considered unpopular or unorthodox." *Id.* at 1215.

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 10 Similarly, in this case, the sponsors of R-71 submitted 137,000 signatures in 68 days.
 11 This is not evidence of a minority group with unorthodox beliefs. PMW is simply not in the
 12 same position as the NAACP, the Socialist Workers Party, or the Communist Party.
 13

14 **3. The conclusion of the election over a year ago makes it highly unlikely that**
 15 **disclosure will result in threats or harassment that undermine First**
 16 **Amendment rights**

17 The R-71 election concluded over a year ago. Those opposing PMW's position
 18 prevailed. This context makes it additionally improbable that even "uncomfortable
 19 conversations" would occur following disclosure of R-71 petitions, let alone harassment. As
 20 in *Citizens United*, the passage of time affords the court the ability to determine whether
 21 harassment is likely. As previously noted, for nearly two years, the Public Disclosure
 22 Commission has disclosed the names, addresses, contribution amount, and even some
 23 employment information, regarding over 850 donors to PMW. Unlike PMW's intended
 24 witnesses, persons who donated to PMW, without actively participating in campaign rallies,
 25 speeches, or sign-waving, are comparable to individuals who signed the R-71 petition but did
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1 not become campaign spokespersons. Yet PMW has not named a single witness to show
 2 those who supported the R-71 campaign solely through publicly disclosed donations
 3 experienced any harassment. This is particularly noteworthy, given REDACTED's email
 4 entreaties to petition signers, asking for reports of incidents of harm or harassment. Egeler
 5 Decl., Ex. 5 at 30:21 to 33:3. Evidence of disclosure without negative consequences is
 6 precisely the type of information the Court took into consideration in *Citizens United*. The
 7 Court noted that although its donors had been disclosed for years, the Citizens United could
 8 not identify a single instance of harassment or retaliation. *Citizens United*, 130 S. Ct. at 885.

9
 10 Despite widespread disclosure of the names and addresses of their contributors,
 11 endorsers, and spokespersons, there is scant evidence of minor harassment prior to the
 12 election, and no credible indication of harassment after the election. Plaintiffs have failed to
 13 come forward with a genuine issue of material fact necessary to meet their burden in
 14 establishing their First Amendment claim.
 15

16 V. CONCLUSION

17 Defendants respectfully request that the Court grant the State's Motion for Summary
 18 Judgment and order dismissal with prejudice.
 19

20 DATED this 29th day of June, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on this date I electronically filed under seal the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to:

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I declare under the penalty of perjury under the laws of the State of Washington that the above is true and correct. Executed this 29th day of June, 2011.

s/ Anne Egeler
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